State of New Hampshire

Board of Tax and Land Appeals

Governor Hugh J. Gallen
State Office Park
Johnson Hall
107 Pleasant Street
Concord, New Hampshire
03301-3834

Northern Utilities, Inc.

v.

Towns of Durham, Salem and Seabrook

Docket Nos.: 28228-15PT, 28632-16PT, 28230-15PT, 28637-16PT, 28229-15PT & 28641-16PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the following tax year 2015 and 2016 assessments[1] on the "Property" (described further below) located in the "Towns" of "Durham," "Salem" and "Seabrook":

	2015	2016
Durham	$8,029,100	$7,842,100
Salem	$7,754,100	$10,232,700
Seabrook	$11,711,300	$11,222,100

The Taxpayer is a regulated utility providing natural gas distribution services in 44 municipalities: 22 in eastern New Hampshire, including the Towns, and 22 in southern Maine in 2015. (See Municipality Exhibit A, Vol. I, p. 13, and Vol. II, Tab G-7, p. 20.) For the reasons stated below, the appeals for abatement are granted for Salem and Seabrook and denied for Durham.

[1] The Taxpayer also appealed the tax year 2013 and 2014 assessments in the Towns, but withdrew those appeals prior to the hearing on the merits. See BTLA Docket Nos.: 27382-13PT and 27646-14PT (Durham); 27383-13PT and 27647-14PT (Salem); and 27385-13PT and 27649-14PT (Seabrook).

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment on the Property in each Town in each tax year was disproportionately high or unlawful. [See RSA 76:16-a; Tax 201.27(f); Tax 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994).] Disproportionality requires a showing each assessment was higher than the general level of assessment in each Town. (Id.)

The consolidated hearing on the merits[2] consumed seven days (January 22-24 and 28-31, 2019). Each party was represented by two attorneys: Jonathan A. Block and Michele E. Kenney of Pierce Atwood LLP for the Taxpayer; and Eric Maher of Donahue, Tucker & Ciandella, PLLC for Salem and Seabrook and Steven Whitley of Mitchell Municipal Group, P.A. for Durham.

The voluminous record includes documentary exhibits (see Taxpayer Exhibits 1 – 52 and Municipality Exhibits A - EE) and testimony (from three expert witnesses and one lay witness). The parties' attorneys filed other pleadings of note, including: the parties' pre-trial memoranda on January 15, 2019; the Taxpayer's "Post-Hearing Memorandum" on February 15, 2019; the Towns' "Joint Trial Memorandum,"[3] the Towns' "Joint Reply" and the Taxpayer's "Post-Hearing Reply," all filed on March 1, 2019.[4]

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[2] See June 21, 2018 Order consolidating these appeals for all purposes, including all further pretrial proceedings and the hearing on the merits.

[3] The Towns made earlier filings of this pleading on February 15 and 22, 2019 that contained 'inadvertent' errors corrected in the March 1 filing. (See the Town's March 1, 2019 letter.)

[4] The record also includes the Towns' "Joint Motion to Strike Certain Portions of [the Taxpayer's] Reply Memorandum" filed on March 7, 2019 and the Taxpayer's "Objection" filed on March 18, 2019. The board need not rule on that motion because this decision places no weight on those portions of the Taxpayer's Reply Memorandum disputed by the Towns and the issues presented in those pleadings are moot.

The parties filed the following stipulations regarding the levels of assessment (the median ratios calculated by the department of revenue administration):

	2015	2016
Durham	93.4%	92.4%
Salem	91.2%	96.3%
Seabrook	91.7%	96.4%

(See Taxpayer Exhibit Nos.: 2, 3 and 4; Towns' Joint Trial Memorandum, p. 1; and Taxpayer's Post-Hearing Memorandum, p. 40.)

I. Arguments Presented

The Taxpayer argued the assessments were excessive because:

(1) an appraisal prepared and signed by Robert Herman, an MAI appraiser (hereinafter, the "Herman Appraisal," Taxpayer Exhibit No. 1), is the best evidence of the market value of the Property;

(2) the Herman Appraisal considered three approaches and used the income and cost approaches to estimate market value;

(3) using the unit method in his income approach, Mr. Herman completed a discounted cash flow ("DCF") to estimate business enterprise value ("BEV") for the Taxpayer's New Hampshire division, adjusted for intangibles and working capital and then used a reasonable allocation method to estimate the value of the Property in each Town;

(4) in his cost approach, Mr. Herman calculated the replacement cost[5] new less depreciation ("RCNLD") which included a deduction for economic obsolescence;

[5] The parties' appraisers used the terms "replacement cost" and "reproduction cost" interchangeably in their respective reports and testimony with no material differentiation.

(5) Mr. Herman then reconciled his income and cost approach value indications to arrive at the following market value estimates for the Property in each Town:

	2015	2016
Durham	$5,200,000	$5,200,000
Salem	$5,500,000	$5,800,000
Seabrook	$5,800,000	$5,965,000

(6) the Towns' assessments are "extremely disproportionate" (Taxpayer Post-Hearing Memorandum, p. 4) and rely entirely on an appraisal that is biased and not credible for many reasons, including those stated in the "Real Estate Appraisal Review Report" prepared by David M. Cornell (the "Cornell Review Report, Taxpayer Exhibit No. 44"); and

(7) the Taxpayer carried its burden of proving disproportionality and the assessments should be abated based on the market value estimates in the Herman Appraisal adjusted by the levels of assessment, as set forth in the Taxpayer's Post-Hearing Memorandum, p. 40.

The Towns argued the assessments were proper because:

(1) an appraisal (Municipality Exhibit A, with revised pages in Municipality Exhibit Z, hereinafter the "Sansoucy Appraisal"), prepared and signed by George E. Sansoucy and Brian D. Fogg, both certified New Hampshire appraisers and assessors, is the best evidence of the market value of the Property in each Town in each tax year;

(2) the Sansoucy Appraisal applied the cost, sales comparison and income approaches and relied on the cost approach to arrive at the following market value estimates for the Property in each Town:

	2015	2016
Durham	$8,445,300	$8,488,200
Salem	$10,642,900	$11,416,000
Seabrook	$11,084,600	$11,623,000

(3) in his cost approach, Mr. Sansoucy estimated RCNLD "to arrive at an indicated value specific to the assets in each of the [Towns] . . . and then utilized the sales and income approaches to test for the presence (or lack thereof) of economic obsolescence" (see Town's Joint Trial Memorandum, p. 64);

(4) the Herman Appraisal is not credible for many reasons including the fact Mr. Herman did not consider the impact the New Hampshire regulatory environment and laws have on the market value of the Property; and

(5) the appeals should be denied.

II. Findings and Rulings

After a comprehensive review of all of the evidence and arguments presented in these appeals, the board makes the following findings:

2015			
	Durham	Salem	Seabrook
Market Value of the Property	$8,545,000	$7,515,000	$8,130,000
Level of Assessment	93.4%	91.2%	91.7%
Indicated Assessment Based on this Market Value Finding	$7,981,000	$6,853,700	$7,455,200
Appealed Assessment	$8,029,100	$7,754,100	$11,711,300
Appeal Outcome	Denied*	Granted	Granted

*The board finds the difference between the indicated assessment and the appealed assessment (0.6%) is not material.

2016			
	Durham	Salem	Seabrook
Market Value of the Property	$8,760,000	$7,390,000	$8,410,000
Level of Assessment	92.4%	96.3%	96.4%
Indicated Assessment Based on this Market Value Finding	$8,094,200	$7,116,600	$8,107,200
Appealed Assessment	$7,842,100	$10,232,700	$11,222,100
Appeal Outcome	Denied	Granted	Granted

These findings result in abatements for Salem and Seabrook for both tax years but not for Durham. The bases for these findings are detailed in the following subsections:

A. The Taxpayer and the Property

B. Legal Standards

C. The Market Value Evidence Presented

D. Market Value Findings

A. The Taxpayer and the Property

As noted above, the Taxpayer has two divisions (one in New Hampshire and one in Maine) and is a wholly owned subsidiary of Unitil Corporation, a publicly traded utility holding company.[6] Unitil acquired the Taxpayer in 2008 from "NiSource" in a transaction that also included the purchase of Granite State Gas, an 87-mile long underground natural gas transmission pipeline. The reported price for this acquisition was $160 million (plus working capital adjustments). (See Municipality Exhibit A, Vol. I, p. 117.) This acquisition more than tripled Unitil's natural gas customer base and resulted in an expanded service territory.

The Taxpayer owns no generation, "production" or transmission assets. (Cf. Taxpayer Post-Hearing Memorandum, pp. 3 and 8; see, e.g., Municipality Exhibit D, p. 3.) The parties agree the Taxpayer "owns no land" in fee in Durham, Salem and Seabrook. (See Taxpayer's Pre-Trial Memorandum, p. 1, fn. 1.)[7] The Taxpayer does own land, however, in other New

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[6] Unitil has ten wholly owned subsidiaries: two provide natural gas distribution services (the Taxpayer and Fitchburg Gas and Electric Light Company); one is a natural gas pipeline (Granite State Gas); and several are non-operational subsidiaries including Unitil Service Corporation, a subsidiary that provides accounting, tax and other corporate services to the Taxpayer and other subsidiaries. (See Municipality Exhibit A, Vol. I, p. 7 and Vol. II, Tab G-7, p. 2.)

[7] The Taxpayer does, however, utilize public rights-of-way for its underground pipelines; the parties disagree regarding whether such rights are subject to assessment and taxation. (Cf. Taxpayer's Post-Hearing Memorandum, pp. 30-39; and Towns' Joint Trial Memorandum, pp. 55-61.)

Hampshire municipalities and the parties have stipulated this land had a total market value of $10,305,760 in 2015 and $10,592,860 in 2016. (See Herman Appraisal, p. 60 for 2015 and 2016.) This fact is of some importance to the allocation methodology discussed in Section D below.

The Taxpayer owns natural gas distribution pipelines, consisting of "mains" and "service lines," regulator stations and gas meters that are generally homogeneous. Mains refer to pipelines that bring the gas from transmission lines and are generally located in the right-of-way and the service lines are pipelines that connect the mains to individual customers. (See Municipality Exhibit A, Vol. I, p. 34.)

The Taxpayer presently "operates and maintains over 22,800 miles of natural gas piping, and delivers natural gas to over 62,000 residential, commercial, and industrial customers" in New Hampshire and Maine. (Herman Appraisal, p. 35.) As of December, 2014, the Taxpayer reported it had 31,150 customers in New Hampshire; by December, 2015, that figure increased slightly to 31,713 customers. (Sansoucy Appraisal, pp. 13-14.)

Only a small percentage (11.6%) of the Taxpayer's New Hampshire customers are in the Towns; in 2014 and 2015, there were: 638 and 650 customers in Durham; 1,035 and 1,054 customers in Salem; and 1,943 and 1,978 customers in Seabrook. (Id.) This data provides some evidence of the overall stability of the Taxpayer's business operations in each Town and is relevant to the board's application of a valuation method (direct capitalization) in Section D.

There is no dispute a "natural monopoly" exists for natural gas distribution services in each municipality in which the Taxpayer operates. This fact results from regulation by the New Hampshire Public Utilities Commission ("PUC") and the Maine Public Utilities Commission. In effect, the Taxpayer has no competition for natural gas *distribution* in each Town, but its

customers have a choice regarding the *supplier* of the gas they consume. In Durham, for example, the Taxpayer's largest customer, the University of New Hampshire, purchases gas from other suppliers, but pays the Taxpayer the price determined by the PUC for delivery of the gas.

As noted in the Towns' Joint Trial Memorandum, p. 3, without dispute by the Taxpayer:

> Through regulation, [the Taxpayer] is the beneficiary of the "regulatory compact." The "regulatory compact" provides that [the Taxpayer] has a natural monopoly in its service territories and has an obligation to serve within those territories. In return, [the Taxpayer] (1) gets reimbursed for operating, maintenance, administrative and general expenses, taxes (local, state, federal [sic] etc.) and interest on debt, (2) earns a return of [the Taxpayer's] prudently incurred costs through depreciation, and (3) earns a reasonable return on investment sufficient to attract investors. [Brackets and citation omitted]

In brief, the board finds the Taxpayer's New Hampshire division constitutes a single economic unit[8] and should be valued accordingly. This finding is consistent with the board's reasoning in prior decisions.[9] The Towns' arguments to the contrary are not persuasive. (Cf. Towns' Joint Memorandum, pp. 15-20; see also Taxpayer's Post-Hearing Reply, pp. 6-8.)

B. Legal Standards

The parties recognize the Property in each Town is subject to taxation based on its market value, defined as "the property's true and full value...." (See, generally, RSA 75:1 ("How Appraised"); and RSA 72:8 ("Electric Plants and Pipe Lines"). The latter statute specifically provides that "structures, machinery, . . . fixtures of all kinds and descriptions, and pipelines employed in" the "distribution" of "natural gas. . . shall be taxed as real estate in the town in

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[8] See The Dictionary of Real Estate (6th ed.), pp. 72-73): an economic unit is "[a] combination of parcels in which land and improvements are used for mutual economic benefit . . . [which] must be managed and operated on a unitary basis."

[9] See, e.g., Portland Pipe Line v. Town of Gorham, BTLA Docket Nos. 24198-08PT, 25123-09PT and 25539-10PT (July 22, 2013), pp. 9-10 and fn. 11; and Androscoggin Valley Country Club v. Town of Gorham, BTLA Docket Nos. 22744-06PT, 23419-07PT (May 26, 2009) pp. 4-5.

which said property or any part of it is situated.").[10] Also of relevance to these appeals is RSA 72:9, which specifically authorizes such property, when it is "situated in or extend[s] into more than one town," to be "taxed in each town according to the value of that part lying within its limits." (Cf. Towns' Joint Trial Memorandum, pp. 5-6.)

In making market value findings, the board considers and weighs all of the evidence presented, including the parties' appraisals and testimony, applying the board's "experience, technical competence and specialized knowledge" to this evidence. See RSA 71-B:1; and former RSA 541-A:18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board has the ability, recognized in the statutes, to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it"). Further, where there is conflicting evidence, the board must determine for itself the weight to be given each piece of evidence.

The board is guided by the considerable body of law developed in New Hampshire with respect to the valuation of utility property for tax purposes. Most recently, the supreme court, in Public Service Company of New Hampshire v. Town of Bow, 170 N.H. 539, 542-43 (2018)

[10] Pursuant to RSA 83-F, the Property is also subject to a separate "Utility Property Tax" administered and collected at the State level by the DRA, a tax based on the "full and true value" of the Property. (See RSA 83-F:3.) The Taxpayer did not submit the RSA 83-F valuations as evidence in these appeals, relying instead on the higher values presented in the Herman Appraisal.

(hereinafter Bow), summarized certain key principles as follows:

> "The search for fair market value is not an easy one, and is akin to a snipe hunt carried on at midnight on a moonless landscape." Appeal of Pennichuck Water Works, 160 N.H. 18, 37 (2010) (quotation and brackets omitted). The determination of fair market value is a question of fact. Id. It is extraordinarily difficult to value public utilities, and we give the trier of fact considerable deference in this area. Tennessee Gas Pipeline Co., 145 N.H. at 600 . . .
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> > As we have repeatedly stated, the trier of fact may use any one or a combination of five appraisal techniques in valuing public utility property: original cost less depreciation (rate base or net book), comparable sales, cost of alternative facilities, capitalized earnings, and reproduction cost less depreciation. Typically, all relevant factors must be considered, but a trier of fact need not allocate specific weight to any one of the approaches listed.
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> Id. (quotation, brackets, and ellipsis omitted). . . .
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> "Credibility, of course, is for the trial judge to determine as a matter of fact and if the findings could reasonably be made on all the evidence they must stand." Southern N.H. Water Co. v. Town of Hudson, 139 N.H. 139, 144 (1994) (quotation omitted).
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> Moreover, although [the parties' expert] valuations differed . . ., "conflicts in the evidence were to be resolved by the trial judge, who could accept or reject such portions of the evidence presented as he found proper, including that of the expert witnesses." Id. at 141 (quotation and brackets omitted). As the fact finder, it was proper for the trial court to weigh the conflicting expert testimony. See LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 739-40(2010). Because there is support in the record for the trial court's valuation determination, we cannot find that the court erred as a matter of law in accepting [one expert's] appraisals [over the other.]
>
> To the extent that the town argues that we have previously rejected the net book value approach in valuation of utilities, we disagree. We have never held that a single valuation approach or specific combination of approaches is correct as a matter of law. Appeal of Pub. Serv. Co. of N.H., 170 N.H. 87, 97 (2017). To the contrary, the credibility of an appraisal is a question of fact that the trial court must decide based upon the evidence presented in a given case. Id. This is why the trier of fact is given considerable deference regarding determinations of fair market value and "need not allocate specific weight to any one of the approaches listed." Appeal of N.H. Elec. Coop., 170 N.H. 66, 76 (2017) (quotation omitted). The fact that we have upheld a trier of fact's rejection of the original cost less depreciation, i.e., net book, appraisal technique in a different case, based upon different appraisals, and supported by different testimony, has no bearing upon whether the trial court could properly rely upon that technique in valuing the transmission and distribution network in this case. See Appeal of Pub. Serv.

> Co. of N.H., 170 N.H. at 97. As we have stated, "judgment is the touchstone." Appeal of Pennichuck Water Works, 160 N.H. at 38 (quotation omitted).

See also Public Service Co. of N.H. v. Ashland, 117 N.H. 635, 639 (1977). In addition, it is well recognized that there is never one exact, precise or perfect assessment; rather, there is an acceptable range of values which, when adjusted to the municipality's general level of assessment, represents a reasonable measure of one's tax burden. See Wise Shoe Co. v. Town of Exeter, 119 N.H. 700, 702 (1979).

The board applied these principles to decide recent tax abatement appeals (involving an underground crude oil pipeline and two electric utilities[11]) and has applied them here. The board is persuaded by the record that the Taxpayer met its burden of proving the tax year 2015 and 2016 assessments were disproportional in Salem and Seabrook, but not in Durham.

C. The Market Value Evidence Presented

The board examined the extensive testimony of the expert appraisers, both on direct and cross-examination, and their written appraisal reports, as well as their qualifications and experience.[12] The parties' respective market value arguments center on this evidence.

To meet its burden of proving disproportionality, the Taxpayer relied primarily upon the testimony and analyses of two experts and one lay witness.[13] Mr. Herman and Mr. Cornell are

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[11] See Appeal of Town of Gorham, unpub. mem. dec. (non-precedential order) (November 25, 2014), 2014 WL 11485804, affirming Portland Pipe Line v. Town of Gorham, BTLA Docket Nos. 24198-08PT, 25123-09PT and 25539-10PT (July 23, 2013), pp. 7-8; and Appeal of Public Service of New Hampshire d/b/a Eversource Energy, 170 N.H. 87 (2017) (hereinafter "Public Service 2017"); and Appeal of New Hampshire Electric Cooperative, Inc., 170 N.H. 66 (2017) (hereinafter "NHEC 2017"). The latter affirm the board's decisions in BTLA Docket Nos. 26246-11PT, et al. and 26401-11PT, et al. (July 2, 2015)

[12] The board placed little or no weight on Taxpayer allegations attacking the credibility and purported 'bias' of the Towns' expert witness, Mr. Sansoucy, and the Towns' responses. (Cf., the Taxpayer's Post-Hearing Memorandum, pp. 15-17 with the Towns' Joint Trial Memorandum, pp. 80-81, and Joint Reply Memorandum, p. 4.) While there may be some credence to these allegations, the central focus in these tax abatement appeals is on the credibility of the value opinions of each appraisal in light of the evidence as a whole.

both MAI appraisers who prepared and presented the Herman Appraisal and the Cornell Review Report, respectively. Mr. Herman is a certified general appraiser and a managing director with Duff & Phelps, LLC. (See Taxpayer Exhibit No. 1, Vol. 1, Tab 2015, p. 83 and Tab 2016, p. 82; and Taxpayers' Post-Hearing Memorandum, p. 4 and fn. 1.) Mr. Cornell is a certified general appraiser and assessor supervisor in New Hampshire with his own consulting firm. (See Taxpayer Exhibit No. 44, pp. 76-78.)

The Herman Appraisal developed two income approaches (a DCF analysis and direct capitalization) and a cost approach. Mr. Herman did not complete a sales comparison approach, but did include limited information regarding six comparables.

Mr. Herman used the unit method in both of his income approaches. In his DCF analysis, he projected revenues and expenses over a ten-year holding period and calculated a residual value to arrive at an estimate of BEV for the New Hampshire division. He then allocated a portion of BEV to each Town using a combination of three metrics.[14] The board finds, however, reliance on Mr. Herman's DCF is not appropriate for several reasons. First, the Taxpayer's actual financial information indicates the performance of the New Hampshire division was generally stable.[15] (See, e.g., Municipality Exhibits C, p. 19 and D, p. 19.) Second, as the Towns established in their cross examination of Mr. Herman, his DCF is based on very

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[13] Jonathan Giegerich, employed as the Tax Manager for Unitil Service Corporation, testified regarding the Taxpayer's accounting and record-keeping practices and its reporting to regulatory bodies. (Cf. the Giegerich Deposition, Municipality Exhibit B.)

[14] Cf. Towns' Joint Trial Memorandum, pp. 38-45, which discusses these metrics (percent of NBV, customers and revenues) and Mr. Herman's "inconsistent" use of them.

[15] Cf. Eames v. Town of Littleton, BTLA Docket No. 17144-96PT (December 15, 1998) at p. 4: "DCF analyses are generally used for properties that show wide fluctuations in income and expenses over a period of years or for properties that are at the initial development or lease-up stage."

speculative assumptions regarding future revenues, expenses and capital expenditures that were not well supported by his appraisal and testimony.

On pages 58-59 of his appraisal, Mr. Herman presents a direct capitalization approach but the board finds it is not persuasive because he utilized many of the same questionable and speculative assumptions and projections he used in his DCF.[16] Contrary to the Taxpayer's arguments (see Taxpayer's Post-Hearing Memorandum, p. 6), Mr. Herman did not 'reconcile' the value conclusions in his DCF and direct capitalization approaches to arrive at an "implied market value" resulting from his two income approaches. (See Towns' Joint Reply, p. 5.) Instead, he disregarded the value indication arrived at in his direct capitalization approach and relied entirely on the results of his DCF. (See Herman Appraisal, pp. 58-59.)

In his cost approach, Mr. Herman estimated the value of the Taxpayer's assets in each Town by trending original costs and then deducting for both physical depreciation and economic obsolescence. The board is not persuaded by Mr. Herman's depreciation estimates, specifically his 25% deduction for economic obsolescence. This deduction is inconsistent with other data in his appraisal regarding the natural gas industry (id., pp. 28-32) and the Taxpayer's financial performance, as well as the quality of its assets, which the parties agreed were well managed and in good condition.

The Taxpayer's second expert, Mr. Cornell, reviewed the Sansoucy Appraisal and discussed "weaknesses" which are summarized on page 72 of Mr. Cornell's report. He also advocated for use of NBV to value regulated utility property. NBV, however, was not the

[16] Cf. Towns' Joint Trial Memorandum, p. 3, fn. 2, where the Towns note Mr. Herman "did not rely on this analysis" and simply used it "as a check on his DCF." In actuality, the analysis, relying on the same speculative data as in the DCF model, is quite circular in nature. As Towns have argued, "Mr. Herman's direct capitalization analysis was only consistent with his DCF analysis because Mr. Herman calculated both using the same non-credible inputs." (See Town's Joint Reply, p. 5.) The board agrees. For example, Mr. Herman averaged five years of his revenue projections to arrive at his stabilized revenue number, which is simply not credible when compared to the Taxpayer's actual revenues.

valuation methodology proffered by the Taxpayer in these appeals. See, e.g., Taxpayer's Post-Hearing Memorandum, p. 5, where the Taxpayer acknowledges "Mr. Herman did not place reliance on the net book value approach," but only that "net book value can serve as a reality check on the income and cost approach results . . . ."

One of Mr. Cornell's main beliefs is that the market value of regulated utility properties is essentially synonymous with NBV; in his own words, "all things being equal, the assets should sell near net book value." (Cornell Review Report, p. 30.) The board finds that is far from established fact since NBV is only one of five recognized valuation methods recognized by the supreme court.[17] The record is clear the parties themselves dispute the relevance of NBV in valuing the Taxpayer's Property in New Hampshire. (Cf. Taxpayer's Post-Hearing Memorandum, p. 5 and Towns' Joint Trial Memorandum, p. 4.)

In defense of the proportionality of the assessments, the Towns relied upon the appraisal and testimony of one witness, Mr. Sansoucy. Mr. Sansoucy is the principal of George E. Sansoucy, PE, LLC, an engineering and appraisal consulting company, and is a registered professional engineer, a certified general appraiser and assessor supervisor in New Hampshire.[18] (See Municipality Exhibit A, Vol. I, p. 144.) As the Taxpayer noted, Mr. Sansoucy set the assessed values and was then hired to "defend" those values. (See Taxpayer's Post-Hearing Memorandum, p. 15.)

The Sansoucy Appraisal employed the cost, sales comparison and income approaches to value the assets in Salem and Seabrook individually, rejecting the unit approach; instead, he valued the Taxpayer's assets in each Town as if each were a separate economic unit. Mr.

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[17] See, e.g., Bow, quoted above, 170 N.H. at 542.

[18] Brian D. Fogg, a certified general appraiser and assessor supervisor in New Hampshire, also signed the Sansoucy Appraisal but did not testify.

Sansoucy did not complete either an income or sales comparison approach for Durham because of his unjustified concerns regarding the Taxpayer's financial data and instead relied solely on the cost approach. (See Sansoucy Appraisal, pp. 125 and 139.)

The board was unable to rely on Mr. Sansoucy's value conclusions for several reasons. As a preliminary and fundamental matter, the board does not agree with his unsupported belief the assets in each Town would be sold and operated independently from each other. Further, by valuing the assets in each Town individually, both his income and cost approaches to value are contrary to the board's highest and best use finding (discussed in Section D).

In addition, Mr. Sansoucy made several meritless "extraordinary assumptions" that tainted the conclusions in his appraisal. In particular, he made the accusation that the Taxpayer's reported revenues were "unreliable" and "underreported." (See Sansoucy Appraisal, pp. 27-28 and pp. 71-72.) The Sansoucy Appraisal states: "An extraordinary assumption implies that if the assumption was found to be false, the opinion of value could be altered." (Id.) His assumptions were not borne out by the evidence presented, including Mr. Giegerich's rebuttal testimony, and were shown to be false. (See Taxpayer's Post-Hearing Memorandum, pp. 17-20.) As a result, Mr. Sansoucy overestimated "EBITDA," an error that inflated the market value indications arrived at in both his income and sales comparison approaches to value.

Further, the board finds little if any probative weight can be given to either the cost or sales comparison approaches and evidence presented in these appeals. To begin with, the board found significant deficiencies in the cost approaches utilized by both Mr. Herman and Mr. Sansoucy. While a substantial amount of information regarding original costs was presented by the parties, the board is not persuaded the "trending factors" used to adjust these costs to the April 1, 2015 and April 1, 2106 dates of assessment resulted in an accurate estimate of

replacement cost. The original cost data maintained by the Taxpayer does not account for "CIAC" (contributions in aid of construction). Clearly, any cost estimate that excludes CIAC is insufficient to replicate the Taxpayer's entire distribution system.

Another issue that influences the credibility of any cost approach is the estimation of depreciation, an issue on which the parties fundamentally disagree. Clearly, the definitions of depreciation used in real estate valuation and in the rate making process for regulated utility companies are distinct and not interchangeable.[19]

The parties also fundamentally disagree whether and how to value the ROWs, which is a necessary step in a cost approach. (Cf. Taxpayer's Post-Hearing Memorandum, pp. 29-39; Towns' Joint Trial Memorandum, pp. 55-62; and the Town's Joint Reply, pp. 1-2.) The board need not address these disagreements further because of its findings (discussed above) that the cost approach used by each party does not result in a credible indication of value.

The board considered the application of the sales comparison approach, a valuation approach based on the principle of substitution: i.e., a buyer would not pay more for one property than for another comparable property. As noted above, regulated utilities operate as monopolies in their respective franchise areas. Arguably, there are few if any substitutes and therefore a limited number of comparable sales. As a result, this approach is fraught with obstacles and, in these appeals, the disparate sales presented involved varying mixes of assets and buyer and seller motivations that limit the ability of any appraiser to make reasonably supported adjustments. (See also Herman Appraisal, p. 45.)

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[19] Cf. The Appraisal of Real Estate, 11th ed., p. 365 (1996); the definition of depreciation used by The National Association of Regulatory Utility Commissioners, The American Institute of Certified Public Accountants and Direct Testimony of Mr. Paul M. Normand before PUC in Docket No. DG17-048 (Municipality Exhibit A, Volume II, Tab B (21), pp. 8-10 of 87).

Contrary to the parties' arguments,[20] the board is not persuaded the outcome of these appeals should be based entirely on the total acceptance of the appraisal methodologies and value conclusions presented by the Taxpayer's or the Towns' experts. To do so would require the board to overlook the deficiencies in the actual evidence and arguments presented. The board will not discuss in excess detail the additional areas of contention between the parties' experts, disputes further reflected in the Taxpayer's Post-Hearing Memorandum and the Towns' Joint Trial Memorandum. Instead, the board will briefly summarize below the remaining material issues that require resolution in order to make its own market value findings.

D. Market Value Findings

Aside from their arguments regarding the merits of the income, cost and sales comparison approaches, the parties also sharply dispute whether the unit method should be used to value the Property. The supreme court has succinctly described this method as follows: "Under the unit method, an appraiser first values all of a utility's property as a whole and then allocates that whole unit value to the individual municipalities where the utility's property is located." (See Public Service 2017, 170 N.H. at 91-92). Based on the record, and after considering all of the arguments presented, the board finds it is reasonable to use the unit method and the income approach to value the Property.

By and large, the physical assets (the natural gas distribution pipelines, mains and service lines) owned by the Taxpayer in each Town are homogeneous. While the Towns themselves may differ in terms of economic characteristics, such as the mix of residential and commercial customers, the board is not persuaded these differences are material enough to overcome the

[20] Cf. the Taxpayer's Post-Hearing Memorandum, pp. 13-14 and 40; and the Towns' Joint Trial Memorandum, pp. 2 and 63-64.

reasonableness of the unit method to value the Property. The board simply does not agree with the Towns' arguments to the contrary. (Cf. Towns' Joint Trial Memorandum, pp. 15-19; and Taxpayer's Post-Hearing Memorandum, pp. 6-10.)

A further consideration underlying this finding is that it is unlikely, to say the least, that the physical assets owned by the Taxpayer in any particular Town would be sold separately. Instead, the board finds the highest and best use of the Property is as part of a single economic unit operating in the New Hampshire regulatory environment. Even if, as Mr. Sansoucy testified, it would be physically possible to separate the assets in one Town from those in surrounding municipalities, it is unlikely to be financially feasible due to the protracted regulatory approval process and substantial integration costs associated with the sale. Mr. Sansoucy stated that the motivation for many sale transactions are to gain operational efficiencies and "synergies," but hypothetically segmenting the economic unit into smaller pieces would, in all likelihood, have the opposite effect.

This finding is supported by evidence in the record regarding integration costs (more than $3.2 million) incurred by Unitil in its acquisition of the Taxpayer from NiSource in 2008. (See, e.g., Municipality Exhibit F, p. 545.) At the time of that transaction, both parties were professionally managed utility holding companies who no doubt completed detailed analyses to satisfy their own expectations and obtain approval from the PUC.

Consequently, valuing the assets of the Taxpayer in New Hampshire as a single economic unit and then allocating values to each Town results in a more credible opinion of value that is consistent with the Property's highest and best use. (See Portland Pipe Line, pp. 8-9). The board

is aware of the challenges inherent in allocation but, using its judgment and experience, finds this framework results in more reasonable market value conclusions.[21]

The board examined the vastly different assumptions and projections of each of the experts and then utilized the financial and other evidence presented to develop a reasonable estimate of the Property's market value using the income approach.[22] The record contains the Taxpayer's detailed financial records for many years including gross revenue, general, administrative and operational expenses, capital expenditures, costs of debt and other items.

A likely buyer of the Property would focus on the income stream generated by the Property. The Taxpayer's actual revenues and expenses for 2012 through 2016 provide a reasonable basis to estimate stabilized gross revenues of $80 million for 2015 and $82.5 million for 2016, operating expenses of 75% of gross revenues[23] and seven percent (7%) for reserves for replacement.[24] These estimates result in operating income of $14.40 million in 2015 and $14.85 million in 2016.

This operating income, however, includes items not subject to taxation (intangibles) and taxable assets not present in the Towns (land). The board finds a two percent (2%) deduction for intangibles is reasonable. (See generally Municipality Exhibit C, p. 3 and Municipality Exhibit D, p. 3.) To remove the impact of the land values on operating income, the board converted the stipulated values of the Taxpayer's land in other municipalities ($10,305,760 in 2015 and

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[21] See Public Service of New Hampshire v. Town of Andover, BTLA Docket Nos. 26246-11PT, et al. (July 2, 2015) ("The method of allocating the total unit value is critical to arrive at credible indications of market value of the Property in each municipality.").

[22] The board followed this approach in the Portland Pipe Line decision, modifying several appraisal assumptions and making its own calculations to estimate market value.

[23] Cf. Municipality Exhibit A, Volume I, p. 135 and Joint Trial Memorandum, p. 74.

[24] Cf. Municipality Exhibits C, p. 8 and D, p. 11.

$10,592,860 in 2016) into revenue by multiplying those land values by capitalization rates of 9.627% and 9.581% for tax years 2015 and 2016, respectively.[25] These deductions result in net operating income ("NOI") of $13.120 million in 2015 and $13.538 million in 2016, which must be allocated to each Town.

Using its judgment and experience, the board finds the most reasonable allocation metric is the percentage of base revenue generated in each Town. Base revenue[26] is the Taxpayer's revenue attributable to the actual distribution of natural gas and not the cost of the gas (which the parties agree is a pass-through item). The Taxpayer generated 6.72% and 6.66% of its base revenue in Durham, 5.43% and 5.18% in Salem and 5.51% and 5.56% in Seabrook in 2015 and 2016, respectively. The resulting Town-specific NOIs are:

	2015	2016
Durham	$881,664	$901,631
Salem	$712,416	$701,268
Seabrook	$722,912	$752,713

The next step in the valuation process requires estimating an overall capitalization rate. The board considered the Taxpayer's equity return and debt rates permitted by the PUC and the Taxpayer's actual financial performance in its analysis and then applied a 50/50 debt/equity capital structure, a debt rate of 6.75% and an equity return rate of 8.75% to find a 7.75% overall capitalization rate is reasonable for both tax years. (Cf., Joint Trial Memorandum, p. 33, and Appendix A, p. 371; Municipality Exhibit A, Volume II, Tab G-4, p. 25 and Tab G-5, p. 27; and Municipality Exhibit F, p. 560.)

[25] These deductions total $992,105 and $1,014,860 for 2015 and 2016, respectively, using an overall capitalization rate of 7.75% (as explained on this page) adjusted by what the parties referred to as "tax adders" (which the board calculated to be 1.877% and 1.831%, respectively).

[26] The percentage of base revenue estimates are based on financial information for December 31, 2014 for tax year 2015 and for December 31, 2015 for tax year 2016. (See Municipality Exhibit A, Vol. II, Tab D-2, p.4.)

Adjusting this 7.75% rate by the level of assessment in each Town (using the stipulated tax rates and levels of assessment) results in the following Town-specific capitalization rates: 10.32% and 10.29% for Durham, 9.48% and 9.49% for Salem and 8.89% and 8.95% for Seabrook for 2015 and 2016, respectively.

The final step in the direct capitalization approach requires division of the Town-specific NOIs by the respective Town-specific capitalization rates. The resulting rounded market value findings for each Town and each tax year are as follows: $8,545,000 and $8,760,000 for Durham; $7,515,000 and $7,390,000 for Salem; and $8,130,000 and $8,410,000 for Seabrook. Adjusting the market value findings by the levels of assessment results in:

- no abatement for Durham; and
- the following tax year 2015 and 2016 abated assessments: $6,853,700 and $7,116,600 in Salem and $7,455,200 and $8,107,200 in Seabrook, respectively;

as noted in the tables presented above (on page 5).

III. Summary

In summary, the board finds the Taxpayer met its burden of proving disproportionality for the Towns of Salem and Seabrook, but not Durham. Therefore, the Towns of Salem and Seabrook are ordered to abate the tax year 2015 and 2016 assessments as detailed above.

If the taxes have been paid, the amount paid on the value in excess of these abated assessments shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (collectively "rehearing motion") within thirty (30) days of the clerk's date below, not the date this decision is received. RSA 541:3; Tax 201.37.

The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; Tax 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule Tax 201.37(g). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Albert F. Shamash, Member

Theresa M. Walker, Member

CERTIFICATION

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Jonathan A. Block, Esq., Pierce Atwood LLP, Merrill's Wharf, 254 Commercial Street, Portland, ME 04101 and Michele E. Kenney, Esq., Pierce Atwood LLP, One New Hampshire Avenue, Suite 350, Portsmouth, NH 03801, Taxpayer's Representatives; Eric A. Maher, Esq., Donahue Tucker & Ciandella, PLLC, 16 Windsor Lane, Exeter, NH 03833; and Steven M. Whitley, Esq., Mitchell Municipal Group, P.A., 25 Beacon St. East, Laconia, NH 03246, counsel for the municipalities.

Date: May 17, 2019

Anne M. Stelmach, Clerk